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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH NICHOLAS EARL, Defendant and Appellant.	2d Crim. No. B230345 (Super. Ct. No. GA075790) (Los Angeles County)

A jury found Joseph Nicholas Earl guilty of deliberate, willful and premeditated attempted murder of N.S. (Pen. Code, § 664, 187, subd. (a)), that he personally inflicted great bodily injury on N.S. (§ 12022.7, subd. (a)) and that he intentionally discharged a firearm inflicting the injury (§ 12022.53, subds. (b)-(d)).[1] The jury also found Earl guilty of mayhem on N.S. (§ 203) and personal use of a firearm (§ 12022.53, subds. (b)-(d)). The jury found Earl committed an assault against N.S.'s boyfriend D.G., Jr., their son D.G. and their daughter Do.G.[2] as well as Rafiki Harbin and Erwin Lee (§ 245, subd. (b)) with personal firearm use as to each victim (§ 12022.5).

[1] All statutory references are to the Penal Code unless otherwise stated.

[2] N.S.'s boyfriend shall be referred to as D.G., Jr. Their children shall be referred to as D.G. and Do.G.

The jury found Earl personally inflicted great bodily injury on Harbin (§ 12022.7, subd. (a).) The jury found Earl committed all the offenses for the benefit of a criminal street gang. (§ 186.22, subd. (b).)

In a separate court trial, the court found Earl suffered a prior serious or violent felony within the meaning of the three strikes law. (§§ 1170.12, subds. (a)-(d) and 667, subds. (b)-(i).) The court also found he served a prior prison term. (§ 667, subd. (a)(1).) The court sentenced Earl to 78 years to life in state prison. We affirm.

FACTS

N.S. and D.G., Jr. have two children, D.G. and Do.G. N.S. and D.G., Jr. lived in Altadena, but moved to Arizona with their children in 2000. They returned to Altadena occasionally to visit family. D.G., Jr. was a member of the Altadena Block Crips gang.

N.S., D.G., Jr. and their children were visiting Altadena on January 2, 2009. While driving, D.G., Jr. saw a friend. He parked in front of a liquor store to talk to his friend. D.G., Jr.'s friend told him it was not good for him and his family to be there. D.G., Jr. and his family left the liquor store to visit Erwin Lee. They saw Lee on the street with his cousin, Rafiki Harbin. They stopped and everyone got out of the car.

At about 5:20 p.m., the sun was setting. N.S. and her family were getting ready to leave. D.G., Jr. told the children to get back into their car. N.S. saw Earl walking toward her from the park. Earl crossed the street under a street light. N.S. could see his face. He wore a hoodie sweatshirt. His hair was in a pony tail. From about six feet he said, "What's up now?" Earl pulled out a gun and shot N.S. several times. She fell to the ground and screamed. She felt another shot hit her back and pretended to be dead. She laid there until her son, D.G., brought her a cell phone. She called 911. Harbin had also been shot.

D.G. testified at trial. He was 11 years old at the time of his testimony. He was in the car at the time of the shooting. He saw the shooting out the back window. He identified Earl as the shooter. He said Earl got out of a black truck. When the shooting was over, he got back into the truck.

The surveillance video of the liquor store where D.G., Jr. and his family had stopped on January 2, 2009, was played for the jury. The video showed Earl wearing a gray hoodie.

D.G., Jr. testified he saw the shooting, but could not identify the shooter. He said there is a code of conduct among gang members that you do not "snitch" on a gang member, even one from a rival gang.

Harbin suffered a single gunshot wound to his left arm. He said he did not see the shooter's face.

Eyewitness Testimony

At trial, N.S. testified she got a good look at the shooter. She identified Earl in court. She said she did not identify Earl at the preliminary hearing because a member of D.G., Jr.'s family told her she "should not be coming to court, snitching and [she should] just let the streets handle it." An audiotape of a telephone message she left for the prosecutor after the preliminary hearing was played for the jury. She said she was too afraid to identify Earl, but she "knew that was the guy that shot [her]."

N.S. gave her sister a description of the person who shot her. N.S.'s sister said "that may have been a person named Baby Hunt Down." Baby Hunt Down is Earl's gang moniker.

At the hospital, detectives showed N.S. three 6-pack photographic lineups. N.S. did not identify anyone in the first two. She said, however, that a person in each of the first two lineups looked familiar. Earl's picture was not in the first two lineups. N.S. said the shooter looked like photograph three in the third six-pack, but she did not recall seeing tattoos around his neck. The photograph was of Earl. The detective did not consider it a positive identification. After N.S. failed to make a positive identification, the detective told her the suspect was in lineup number three.

The detective showed the photo lineups to D.G. D.G. circled two photographs, one was of Earl. The detective told D.G. to concentrate on three of the photographs, one of which was Earl's.

N.S. called her foster mother about the names of possible suspects. Her foster mother gave her Earl's name. She told the detective she did not know who Earl was.

After a detective told N.S. that Earl had been arrested in her case, she looked Earl up on MySpace. She saw Earl's photograph and recognized him as the shooter.

Defense

Dr. Robert Shomer testified as an expert in eyewitness identification. Shomer testified: The presentation of a single photograph of a suspect is unfair and tends to produce an inaccurate identification. Presentation of successive photographic lineups with the same photograph in each lineup is unduly suggestive. It unfairly affects the accuracy of an identification if the administrator of the lineup tells a witness who fails to identify anyone that the suspect's photograph was actually one of the six. It also unfairly influences the identification if prior to the lineup the witness is given the identity of the person others believe to be the suspect. If prior to viewing the six pack, the witness had seen a photograph of the suspect, it would tend to influence the identification.

Shomer also testified: If a witness failed to make an identification at a time close to the incident, a subsequent identification made years later would be unreliable. When a witness discusses the incident with others it can unfairly influence identification. Child witnesses are very susceptible to suggestion. High levels of stress and poor lighting will tend to diminish the accuracy of a witness's observation and memory.

DISCUSSION

I.

Earl contends the trial court erred in denying his request for a "pinpoint" instruction on eyewitness identification.

The standard instruction of eyewitness identification, CALCRIM No. 315, lists a number of factors for the jury to consider in assessing the accuracy of the

identification. Among the factors is, "How certain was the witness when he or she made an identification?

Earl proposed eliminating the "certainty" factor and adding three factors: (1) Was the witness influenced in his or her identification by discussions with others? (2) Was the witness influenced by the way in which the examiners constructed the photo lineup? (3) Was the witness influenced by the way in which the examiners conducted the photo lineup identification sessions?

Earl also proposed adding the following sentence at the end of the instruction: "If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find him not guilty."

The trial court denied Earl's request to delete the "certainty" factor and to add the three other factors. The court, however, granted the request to add the sentence at the end of the instruction.

Earl does not contest the trial court's ruling that the certainty factor should remain in the instruction. He argues, however, that the trial court erred in excluding his three proposed factors.

Earl is entitled to an instruction that pinpoints the theory of his defense. (*People v. Noguera* (1992) 4 Cal.4th 599, 648.) But he is not entitled to an argumentative instruction; that is, an instruction that invites the jury to draw inferences favorable to one of the parties from specified items of evidence. (*People v. Panah* (2005) 35 Cal.4th 395, 486.)

Here Earl's proposed additional factors are argumentative. They were derived from Shomer's expert testimony. The jury was not required to find Shomer's testimony credible. Earl is not entitled to an instruction derived from the testimony of his expert.

In any event, if the trial court erred, the error was harmless by any standard. Nothing about the instructions, as given, prevented Earl from arguing or the jury from considering the factors the trial court excluded from the instruction.

II.

Earl contends the trial court erred in denying him a new trial based on the prosecutor's misconduct.

Earl claims the prosecutor committed misconduct in arguing to the jury that Earl was wearing glasses at trial to hide his identity.

Both N.S. and D.G. testified Earl was not wearing glasses at the time of the shooting. Detective Joel Nebel testified that he met with Earl approximately 20 times prior to trial and on none of those occasions was Earl wearing glasses. The trial court acknowledged for the record that Earl wore glasses at times during the trial.

The prosecutor argued in summation: "Ladies and Gentlemen, you have heard from a lot of witnesses in this case, and you have heard - - seen physical evidence. But I submit to you that you have also - - the defendant himself has sent a message as well because people wear glasses for different reasons. Some people wear them to correct their vision. Other people wear them to make themselves look smarter. Other people wear them to disguise their real appearance. Why would somebody do that? Why would somebody want to disguise their appearance if they didn't do anything and they're not the right person: [¶] We have so many pictures of the defendant dating back to 2005 with no glasses. Detective Nebel contacted the defendant at least 20 times and never once saw him wearing glasses. He was arrested in this case and no glasses. Wanted to take gang tattoo photos, no glasses. No glasses. No glasses. No glasses. Every picture on MySpace he has a picture, he has no glasses. But here in court today and when [N.S.] was testifying, he had to wear glasses. Why? To disguise his appearance. I don't need to spell that out for you."

Earl argues that the prosecutor's comments about his behavior at trial violate his Fifth Amendment right not to be a witness against himself. Earl cites *United States v. Carroll* (4th Cir. 1982) 678 F.2d 1208, 1209, for the proposition that where the

defendant elects not to testify the prosecutor commits misconduct in commenting on the defendant's courtroom behavior as evidence of guilt. In *United States v. Carroll*, the prosecutor argued that the defendant's action in pointing at pictures of the robbery scene for his lawyer showed the defendant was familiar with the scene because he was there. The Court of Appeals determined the comment deprived the defendant of his Fifth Amendment right not to testify and his Sixth Amendment right to counsel. (*Ibid.*) It also noted there was no evidence to support the prosecutor's assertion that the defendant knew more about the photographs than did his counsel. (*Id.* at p. 1210.)

In *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 982, the defendant was charged with threatening the life of the President of the United States. His defense was that he was joking. The prosecutor pointed out to the jury that the defendant laughed when evidence of his threat was being presented. The Court of Appeals determined that the prosecutor's comment violated Federal Rules of Evidence, rule 404(a), prohibiting introduction of the character of the accused solely to prove guilt. (*Id*. at pp. 980-981.) The court also found that a comment on the defendant's off-the-stand behavior was a violation of his due process right to have the case decided on the evidence introduced at trial. (*Id.* at p. 981.)

In *United States v. Carroll*, it is easy to see how the prosecutor's comment on the defendant's attempt to communicate with his lawyer infringes on the right to counsel. In *United States v. Schuler*, the court could reasonably conclude the prosecutor's comment on the defendant's laugh was improper where it had no relevance other than to impugn the defendant's character. But to the extent those cases can be read as holding a prosecutor's comment on the defendant's courtroom behavior is always improper, we decline to follow them. It is a matter best decided on the particular facts.

Here there was evidence Earl did not wear glasses. The prosecutor simply commented on what every juror could see: Earl, who was not known to wear glasses, was wearing glasses while a witness was being asked to identify him. There is nothing unfair about that. (See *United States v. Schuler*, *supra*, 813 F.2d at p. 983 (dis. opn. of Hall, J.) ["Sound policy reasons exist for allowing a jury to consider the courtroom

demeanor of a defendant. As Wigmore noted: '[I]t is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory.' 2 J. Wigmore, *Evidence* § 274 (J. Chadbourn rev. ed. 1979.) [Fn. omitted.] Taken to its logical conclusion, the majority's opinion would require a court to instruct a jury to reach its verdict as if the accused had not been present before it"].)

In any event, the prosecutor did not comment on Earl's courtroom behavior, but his change of appearance. Thus in *People v. Ramirez* (2006) 39 Cal.4th 398, 454, the trial court instructed the jury that it could consider whether the defendant's refusal to remove his sunglasses as ordered by the court so that a witness could identify him showed a consciousness of guilt. Our Supreme Court rejected the defendant's argument that the instruction violated his right to a fair trial, effective assistance of counsel, due process and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It is simply not a violation of any of the defendant's rights for the prosecutor to comment that a defendant who was never previously seen wearing glasses was wearing glasses when a witness tried to identify him.

III.

Earl contends the trial court erred in denying his motion for self-representation.

The jury rendered its verdict on October 13, 2010. The parties agreed to a continuance until November 15, 2010, for a court trial on prior convictions and sentencing. On November 15, 2010, Earl filed his sentencing memorandum and his motion for a new trial. The parties agreed to have the new trial motion and sentencing hearing continued to January 18, 2011.

On January 18, 2011, when the motion for new trial and sentencing hearing was called, Earl announced that he wanted to exercise his right of self-representation. The court stated that the case has been pending for a long time; this is the first time Earl

has requested self-representation; and that a victim was present for the sentencing hearing. The court denied the motion as untimely. In denying the motion, the court found it was made for the purpose of delay.

Earl told the court that two weeks prior to the hearing, he informed his attorney that he wanted to represent himself. Earl said if he did not represent himself there were issues that would not be raised properly. The court asked if he was making an ineffective assistance of counsel claim. He said he was. The court then cleared the courtroom for a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. During the *Marsden* hearing, Earl's counsel confirmed that Earl told him he wanted to represent himself about two weeks ago. Counsel suggested that he wait for the hearing because defendants who say they want to represent themselves often do not really want to do so.

The court again denied the motion. The court said that even if Earl had made his request two weeks ago, it would still have been untimely. Earl objected that his Sixth Amendment right "allows [him] to prepare an adequate defense . . . ." The prosecutor stated that her objection to granting the motion is that it would allow Earl to move for a continuance.

A defendant has the constitutional right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806.) But the right is absolute only if asserted a reasonable time before trial. (*People v. Mayfield* (1997) 14 Cal.4th 668, 809.) Thereafter, the motion is addressed to the trial court's discretion. (*Ibid.*) The timeliness requirement serves to prevent the defendant from using the motion to unjustifiably delay the proceedings or to obstruct the orderly administration of justice. (*Ibid.*)

Here Earl did not make his request for self-representation until after the verdict. Thus the motion is addressed to the discretion of the trial court. The trial court found the motion made on the day of a hearing on a new trial motion and for sentencing was untimely, and would have been untimely if made two weeks earlier. Indeed, Earl had months after the verdict in which he could have asserted his right to self-representation. He gave no credible reason for delaying until two weeks prior to the hearing.

Earl argues that he did not ask for a continuance. But a motion for self-representation granted two weeks prior to the hearing would ordinarily be followed by a request for a continuance. Earl did not tell the court he was ready to proceed. In fact, the prosecutor stated she would object to Earl's motion because granting the motion would allow Earl to move for a continuance. Earl, who was not shy about speaking in court, did not contradict the prosecutor.

Earl's reliance on *People v. Miller* (2007) 153 Cal.App.4th 1015, is misplaced. There the defendant made a request to represent himself at sentencing two months prior to the sentencing hearing. He told the court he would be ready on the date set for the hearing. Here Earl made his request on the date of the hearing, or at best, two weeks prior to the hearing. He did not inform the court he was ready for the hearing.

Earl argues the trial court failed to exercise an "informed discretion." He cites *People v. Windham* (1977) 19 Cal.3d 121, 128. There the court stated: "Among other factors to be considered by the court in assessing [self-representation] requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion."

But the record shows the court considered those factors. It held a *Marsden* hearing on the quality of counsel's representation; it considered the reason for the request and found it was for delay; finally, it considered the stage of the proceedings and the delay that might reasonably be expected. The only factor in Earl's favor is that he had not made a prior request to substitute counsel.

Earl appears to argue the trial court did not realize it had the discretion to grant the motion. He points to the court's statement in denying the motion, "[T]hat is the ruling the law compels me to make." But the trial court found the motion was not timely; it was made for the purpose of delay; and that it would cause delay. Under the circumstances, denial is the ruling the law compels the court to make.

IV.

Earl contends the trial court erred in denying his *Marsden* motion.

A defendant is entitled to have appointed counsel discharged and other counsel substituted upon a showing appointed counsel is not providing or had not provided adequate representation. (*People v. Marsden*, *supra*, 2 Cal.3d at p. 123.) When a defendant seeks to discharge his attorney for inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of his counsel's inadequate performance. (*People v. Albilez* (2007) 41 Cal.4th 472, 487-488.) The decision whether to grant or deny the defendant's request is within the discretion of the trial court. (*Id.* at p. 488.) We will not find an abuse of discretion unless the failure to remove appointment counsel will substantially impair the defendant's right to effective assistance of counsel. (*Ibid.*)

Earl's chief complaint appears to be that his counsel failed to make a pretrial motion to exclude N.S.'s and D.G.'s identification testimony on the ground that the identification procedures were unfair. Earl cites no authority to show that such a motion would have had even a remote chance of success. Competent representation does not require counsel to make meritless motions.

When the trial court asked Earl if there was more, Earl stated: "Furthermore, it is stated that for the record [D.G.], in front of the jury, identified another person as being the assailant perpetrator of the crime. The weight of his evidence - - when it comes to [D.G.]'s, statement, there should have been further investigation. My private investigator Mr. Robert Friedman went to interview him. [¶] We don't have any pre-foundation of evidence from [D.G.], at the time when he made a statement from - - no notes or nothing. [¶] I asked for all that because I need to investigate because at that time, before we went to trial, there were allegedly deals on the table. So I needed a chance to see what evidence was going to be represented at trial, which I never was."

Earl argues his attorney failed to conduct an adequate investigation. (Citing *In re Vargas* (2000) 83 Cal.App.4th 1125, 1138-1140.) But Earl states his investigator went to interview D.G. Earl's complaint appears to be that "[t]here should have been a

further investigation." But Earl does not suggest what there was to investigate further. Earl cites no authority that requires counsel to conduct redundant investigations or to track down every remote possibility.

It is possible Earl was complaining he was surprised to learn at trial that D.G. had identified another person as the assailant. He said he had "no notes or nothing" from the investigation of D.G. He needed the information pretrial because there were "deals on the table." But Earl does not explain how learning D.G. had identified another person as the assailant would have prompted him to take one of the "deals." It seems the information would have had the opposite effect.

Finally, Earl complained that he had pictures of himself with a full goatee. He claimed the pictures could have rebutted N.S.'s identification of him because she identified the assailant as having no facial hair. But other pictures were presented at trial. Earl's counsel told the jury, "In every picture, he has a mustache and goatee."

Earl argues the trial court erred in considering its observations of his counsel's courtroom performance. In denying the motion the court stated: "[T]he ruling is that Mr. Bisnow was not and has not been and is not ineffective. He's a seasoned trial attorney and one of the best trial attorneys in the county in terms of a defense. And there is no way, based on how this trial was conducted, that I can find that he was ineffective."

Earl states that his complaints about his counsel did not concern what happened in the courtroom. But there is no reason why the court should not consider counsel's courtroom performance. Thus, for example, it is generally easy for the trial court to determine from counsel's performance in the courtroom whether counsel is prepared, including whether he has conducted an adequate investigation.

Earl points out that the trial court did not make an inquiry of defense counsel or require counsel's response. But where the trial court does not find the defendant's claims credible, there is nothing to inquire about or respond to.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Suzette Clover, Judge

Superior Court County of Los Angeles

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